United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-1063

United States Court of Appeals For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIAM CORTES-RIOS,

Appellant.

On Appeal From The United States District Court For The Southern District Of New York

Appellant's Brief

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ISSUES PRESENTED

1. Whether the Court of Appeals has the authority to review the criminal sentence imposed by the District Court?

2. Whether the criminal sentence imposed by the District Court was harsh and a product of judicial abuse?

3. Whether the sentencing judge abused his discretionary powers in failing to properly resolve the question of appellant's cooperation with the Government?

4. Whether appellant properly was singled out for more severe sentence than other co-conspirators?

STATEMENT OF THE CASE

Appellant, William Cortes-Rios, appeals from a judgment convicting him, upon a voluntary plea of violation of Title 21, United States Code, Section 846 and also of Section 841(a)(1) in the United States District Court for the Southern District of New York (Goettel, J) on December 22, 1976, at which time he was sentenced, on each count, to a period of twelve years imprisonment, a fine of $20,000, and special parole of three years to follow the prison term, the sentenced to be concurrent.

STATEMENT OF FACT

Appellant is 38 years of age, a family man and a military veteran having received combat wounds in Korea (13)*.

In September 1976 the Grand Jury of the United States for the Souterhn District of New York indicted appellant on a charge of conspiracy to distribute and possess heroin (Title 21, United States Code, Section 846) and also on a charge of distribution and possession of heroin (Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).

Section 841(b)(1)(A) provides for a maximum sentence of 15 years imprisonment.

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* References are to pages in the appendix.

Appellant was immediately taken into custody under the indictment in Puerto Rico at which time he was removed to New York for proceedings in the Southern District.

On November 5, 1976, appellant withdrew his plea of not guilty to the indictment and entered a voluntary plea of guilty to the conspiracy and one count of distribution. (11).

Appellant's voluntary plea was induced by the promise of the trial assistant United States Attorney's promise to advise the sentencing judge of appellant's cooperation with the Government as follows:

> Mr. Buchwald: Yes, your Honor.
>
> The agreement between counsel and Mr. Rios and myself is as follows: That Mr. Rios if he enters a plea of guilty to counts 1 and 2 of the indictment and if he further admits in open court his participation and culpability at that time to count 4 of the indictment, that the Government at the time of sentencing will move to dismiss the open counts, namely 3 and 4 of the indictment.
>
> The only other aspect of the agreement is that the Government will bring to the attention of the sentencing judge and any other appropriate sentencing authorities, be it as to Rule 35 motions or statements to parole boards, any cooperation which Mr. Rios offers to the Government, if such cooperation occurs." (11-12).

When the plea was accepted, defense counsel gave the Court a seven-page statement of confession signed by appellant which set forth a plethora of information and details of all the criminal acts alleged in the indictment and helpful to the prosecution. (12,31-37).

Thereafter, when the prosecutor sought to derogate the contents of the confession, the Court reacted with the following statement:

"I think it is quite detailed ...."

Despite the foregoing the probation department in its pre-sentence report unfairly stated that the appellant "had given the Government no valuable cooperation to date." (40).

However, the probation comment was authored by the prosecutor and not by investigation of impartial sources as can be noted from the following statement by Mr. Buchwald at the time of sentence:

> "We do not believe, as we indicated to the probation department, that there has been any meaningful cooperation rendered by Mr. Rios." (45-46)

The sentencing judge accepted the versions of lack of cooperation by the prosecutor and probation over the protests of defense counsel without examining the true factual situation and imposed sentence

as follows:

> "Consequently, I sentence the defendant on each count to a period of 12 years imprisonment, a fine of $20,000, and special parole of three years to follow the prison terms.
>
> I sentence him to this on each of the two counts, time to run concurrently ...."

POINT I

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW A CRIMINAL SENTENCE IMPOSED BY THE DISTRICT COURT

There appears to be a general proposition in federal criminal jurisprudence that the length of a sentence imposed after conviction of a crime is within the discretion of the trial court and will not be disturbed by a reviewing court. United States v. Floyd (1973) 477 F.2d 217, cert. denied 414 U.S. 1044.

Mr. Justice Stewart, however, recently observed in United States v. Tucker (1972) 404 U.S. 443, 447, that "these general propositions do not decide " all cases wherein review of a sentence is sought.

It should also be noted that there is no absolute statutory prohibition against appellate review of a criminal sentence. On the contrary 28 U.S.C.A. #2106 provides that any "court of appellate jurisdiction may ... modify ... any judgment ... brought before it for review, and may remand the cause and direct the entry of such appropriate judgment ... or require such further proceedings to be had as may be just under the circumstances."

Although the Supreme Court has never clearly stated that Section 2106 authorizes appellate reduction of a harsh or severe sentence, it likewise has never stated that review is precluded by that section.

As a result, there has been a forward development in recent years in the area of appellate review of sentences. See 109 U. Pa. L. Rev. 422, 74 Colum. L. Rev. 379 and Appellate Review of Sentences (1962) 32 F.R.D. 249.

There no longer appears to be a denial of the existence of appellate power to review sentences.

The Courts seem to recognize that hoary decisional precedent is not necessarily superior to the plain verbiage of #2106. In the following cases there has been appellate intervention in the sentencing process:

1. Bryan v. United States, 338 U.S. 552.
2. United States v. Eberhardt (1969) 417 F.2d 1009, cert. denied 397 U.S. 909
3. United States v. McKinney (1970) 427 F.2d 449.
4. United States v. Holder (1969) 412 F.2d 212.
5. United States v. Mitchell (1968) 392 F.2d 214, cert. denied 394 U.S. 902.
6. Austin v. United States (1967) 382 F.2d 129.
7. Scott v. United States (1969) 419 F.2d 264.
8. United States v. Doyle (1965) 348 F.2d 715, cert. denied 382 U.S. 843.
9. Leach v. United States (1964) 334 F.2d 945.
10. United States v. Wiley (1960) 278 F.2d 500.

It is thus respectfully submitted that the sentence herein can and should be reviewed by this Court.

POINT II

THE SENTENCE HEREIN IS HARSH AND A PRODUCT OF JUDICIAL ABUSE

The crime for which appellant stands convicted provides for a maximum sentence of fifteen years. The sentence imposed herein, to wit, twelve years imprisonment to be followed by three years parole, is a maximum sentence for all practical purposes. To claim otherwise is a cynical avoidance of reality.

The operative facts herein for the purposes of sentencing do not call for a maximum sentence. It is respectfully submitted that the Court of Appeals has the power under 28 U.S.C.A. #2106 to review an abuse of discretion in the sentencing procedure and to correct same in its supervisory capacity or in the alternative to remand same to the district court with "corrective" suggestion for a proper, reduced sentence pursuant to a further motion by appellant therein under Rule 35 of the Federal Rules of Criminal Procedure. For this contention we respectfully refer the Court to the authorities set forth in Point I, supra.

Appellant was originally arrested and charged in Puerto Rico. When the Government sought to remove appellant to New York for arraignment, he did not contest such removal.

Shortly after arraignment in New York, appellant entered a voluntary guilty plea. Thus, as a result of appellant's swift submission to authority, the Government at least was able to conserve a great amount of expense, time and effort which would have had to be expended if this had turned into a contested matter at every step and stage of the proceedings.

Although appellant plead guilty to conspiracy and distribution of heroin he was only involved on a "low level" (41) and participated only in "two trips" for the purposes of introducing a co-conspiractor to someone else. (41)

Appellant also is a veterans of military serve having been wounded in combat during the Korean conflict. (13)

He was never in any previous conflict with legal authority. The Court below recognized this as follows:

> "The two positive factors he has going in his behalf are the fact that he has a very minimal prior criminal record, almost inconsequential, and that he did enter a guilty plea which is some sign of rehabilitation and acknowledgment of his culpability." (46)

Thus, although the sentencing judge recognized that appellant spilled blood inthe defense of his country, had an inconsequential criminal record and manifested a rehabilitative

propensity, he still imposed a maximum sentence upon appellant without any valid reason. Such action is arbitrary, harsh and an abuse of the sentencing process.

A converse of the sentence herein surely would have been more appropriate , to wit, 3 years imprisonment and 12 years parole.

POINT III

THE PROSECUTOR FAILED TO HONOR HIS PROMISE TO NOTIFY THE SENTENCING JUDGE OF APPELLANT'S COOPERATION WITH THE GOVERNMENT

Appellant's plea of guilty was a product of plea bargaining whereby the trial assistant United States Attorney induced the plea by promising to advise the sentencing judge of appellant's cooperation with the Government. This is clearly demonstrated by the following statement made by the prosecutor at the time of appellant's change of plea:

> "the agreement between counsel and Mr. Rios and myself ... is that the Government will bring to the attention of the sentencing judge and any other appropriate sentencing authorities, be it as to Rule 35 motions or statements to parole boards, any cooperation which Mr. Rios offers to the Government if such cooperation occurs." (11-12)

Immediately thereafter, in open court defense counsel handed a seven-page admission and confession to the trial Court. (12,31-37).

Therein, appellant detailed in great length the entire operation of the narcotic operation which had been the subject of this and other allied indictments. Appellant gave names, dates and places.

The indictment herein listed nine named conspirators Of those nine conspirators, appellant gave information as to six, to wit: Cruz (33), Rivera (32), Hernandez (35), Gallardo (32), Machado (34), Hector (34), Valenzuela (35), Gutierrez (35) and F. Machado (35).

That certainly is an imposing amount of "cooperation". As a matter of fact, when the prosecutor sought to denigrate the seven-page statement at the change of plea proceeding, the Court found it necessary to state contrariwise as follows:

"I think it is quite detailed ..." (20).

Thus, despite the obvious manifestation of cooperation embodied in appellant's statement (31-37) and the prosecutor's promise at the time of sentence, the promise was dishonored. Not only did Government counsel refuse to notify the Court of the obvious cooperation, but he went so far as to inaccurately assert that appellant became recalcitrant and refused to cooperate. This is clear from Mr. Buchwald's following statement at the time of sentence:

> "... There was an expectation of cooperation and we didn't want your Honor to feel that we felt that there had been any. There has not been any, and that is why we mention it explicitly." (46)

Furthermore, the statement in the pre-sentence report that appellant refused to cooperate was supplied solely by Mr. Buchwald,

no other avenue was explored. This is apparent from the prosecutor's admission as follows:

> "We do not believe, as we indicated to the probation department, that there has been any meaningful cooperation rendered by Mr. Rios." (46)

The sentencing Court at that point took the prosecutor's stateemnts at full value and closed its mind and eyes to the seven-page monument of cooperation as can be noted from the following:

> " THE COURT: I think it is proper to consider in a positive sense. If he had been of great help to the Government, I am sure that would be a matter which -- -- "(46)

The prosecutor further beclouded the scene and prejudiced the judge at sentence time by dramatically declaiming "that Mr. Rios was a king pin or right-hand man to the king pin of the largest heroin distribution organization in New York City that we are aware of in recent years." (45).

All of the foregoing rhetoric was ex parte hearsay and not one whit substantiated. The largest heroin organization in New York City in recent years. Heady, impetuous language indeed. And yet it was accepted by the Court without challenge by the imposition of a maximum sentence.

The court below in the interest of justice certainly should have required the prosecutor to substantiate his grave charges before continuing with imposition of sentence. This behavior calls for intervention of the Court of Appeals. Where a sentencing judge fails to properly evaluate information available, the appellate tribunal "must scrutinize the sentencing process" for necessary supervisory measures. See Scott v. United States (1969) 419 F.2d 264.

Also an appellate forum should not hestitate to act where a sentence is excessive and out of proportion to the offense. See United States v. McKinney (1970) 427 F.2d 449.

Where a prosecutor fails to keep a promise which induced a guilty plea, the Supreme Court has mandated that such plea is involuntary and may be withdrawn by an aggrieved party. See, Santobello v. New York (1971) 404 U.S. 257.

Since the extreme remedy of withdrawal of pleas is permitted, the lesser step of reducing the sentence should be mandated by this Court, also, because of the failed promise of the prosecution. In this connection, we respectfully urge the Court to act under its previous holding in United States v. Holder (1969) 412 F.2d 212 at page 214 as follows:

> " so manifest an abuse of discretion as to violate traditional concepts, it is possible that we might pursuant to our power to supervise the administration

of justice in the circuit, overturn our long established precedents of non-intervention and intervene."

POINT IV

APPELLANT WAS SINGLED OUT FOR MORE SEVERE SENTENCE THAN OTHER CO-CONSPIRATORS

Upon information and belief Benito Cruz and Raymond Rivera , both co-conspirators, have already been sentenced for their participation in narcotic trafficking. Rivera was placed on probation while a five-year sentence imposed upon Cruz was reduced to four years.

While there is no scientic measurement of the degree of involvement among co-conspirators, there are certain recognizable guidelines.

There surely is no justification for the disparate sentences given to Rivera and Cruz on one hand, and the grotesque maximum thrust upon appellant on the other hand.

The Court of Appeals has the power to "equalize" these sentences by reducing appellant's sentence. See United States v. Wiley, (1960) 278 F.2d 500.

It is thus respectfully submitted that there should be a reduction in the sentence imposed upon appellant.

CONCLUSION

Upon the foregoing the Court should reduce the sentence imposed upon appellant by the District Court or in the alternative should remand the case with corrective suggestion to the District Court for a reduction upon re-sentence.

Respectfully submitted,

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ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 4 day of ~~xxxx~~ March 1977 deponent served the within Brief upon

U.S. Atty., So. Dist. of NY

attorney(s) for

Appellee

in this action, at

1 St. Andrews Pl., New York, NY

the address(es) designated by said attorney(s) for that purpose by depositing _____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 4 day of March, 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978